

Developers score in latest round of nitrogen fee fight

By Lisa Snedeker

RALEIGH – Triangle-area developers won a reprieve this year when state lawmakers agreed to roll back increases in nitrogen buy-down fees.

Environmentalists and government officials say that water quality, especially in the sensitive Neuse River basin, and taxpayers are the big losers in the rate retreat.

New development, residential and commercial, often leads to runoff of nitrogen and phosphorous into waterways, which can degrade water quality by allowing the growth of algae that can lead to fish kills.

Rather than forcing developers to control the pollutants on their development site, the state allows them to pay to control the pollutants off-site, specifically for the Neuse and Tar-Pamlico river basins.

In January, those costs spiked under a new fee structure established by the North Carolina Department of Environment and Natural Resources and the Environmental Management Commission.

On Aug. 8, Gov. Michael Easley signed Senate Bill 1862, which reversed the higher fees. The law rolled the fees back from \$57 per pound of nitrogen per acre, plus additional land costs and administrative fees, to \$11 per pound per acre. The bill also established a fee of \$11 per tenth of a pound of phosphorous.

The lower fee is what developers will be required to pay until the state Environmental Review Commission can study the issue and report its findings to the 2007 General Assembly.

One example of why the fees have been so contentious is found at Main Street Townhomes, a 3.61-acre, federally funded redevelopment public project in Durham. The more aggressive rates would have added up to \$37,235, rather than \$6,039 under the present rate, says Amos Clark, director of the stormwater management group for John R. McAdams Co. Inc., an engineering and consulting firm.

Redevelopment work at the Holman Homes and Goley Street public projects on 22.6 acres in Durham would have cost \$231,419 just for the nitrogen buy-down fees and administrative costs instead of \$40,135 under the current formula, Clark says.

Developers say they were broadsided by the fees implemented in January. "No one

anticipated that the rules would have that result, and the governor's office agreed with us on that," says Bill Scoggin, a partner in the Kennedy Covington law firm, which worked closely with home builders to get the fees scaled back.

DENR officials, as well as environmental groups such as the North Carolina Conservation Network, say the state participated in a lengthy rule-making process, including several public hearings, to increase what they described as inadequate fees.

The Environmental Review Commission, with the assistance of the Division of Water Quality of the Department of Environment and Natural Resources, has been asked to study the costs associated with providing nutrient controls and whether the fee program should be expanded to other areas of the state.

"The environment is the big loser, at least temporarily," says Erin Kimrey, legislative monitor for the North Carolina Conservation Network. "The idea is that they will come up with a somewhat higher fee. The \$11 per pound of nitrogen fee is in no way adequate to cover the cost of preventing nitrogen from getting into the waterways, so the taxpayers are footing the bill."

Some environmentalists disagree with the overall concept of the mitigation fees, Kimrey says. "They think developers should have to mitigate onsite and that

they shouldn't have the option to do it onsite," she says.

Developers say the new nitrogen buy-down fees adopted by DENR in January were cost prohibitive, and they questioned where the fees were being spent.

"Any time you increase a fee by more than 750 percent, it's going to be detrimental," says Rusty Ammons, owner of RLA Development.

"I had one project on three acres with nine lots that beat the deadline by two weeks, but my fee would have gone from \$7,000 to \$41,000," Ammons says. "I would have made less than an acceptable profit margin with that increase."

Developers were also upset that the new fee was to be adjusted on an annual basis.

But Susan Massengale, a spokeswoman for DENR's Division of Water Quality, says that adjustments would have been based on a construction cost index factor, linking the rates to market forces.

The offset fee program was initiated in 1998 and was folded into the DENR's Ecosystem Enhancement Program three years ago.

Bill Gilmore, director of the Ecosystem Enhancement Program, says money collected through the nutrient offset program goes toward engineering and buffer projects.

Massengale says the money pulled in by the program falls short of covering the amount of work that needs to be done.

"That pot of money is decreasing and that's the reason they wanted to change the formula," she says.

Lisa Martin, director of regulatory affairs for the North Carolina Home Builders Association, says even with the fee roll-back, developers still have to provide buffers, build stormwater ponds or pay to have a pond built and put money in escrow in case a pond bursts.

"Where is nitrogen coming from? The air," Martin says. "It's not because of development. The cruel irony is that we were being accused of buying our way out."

Massengale says development not only increases the danger of potentially harmful nutrients making their way into the water, it degrades some natural barriers.

The offset program re-establishes and restores wetlands, forested areas and buffers, she says.